NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

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| DAVID NYSKOHUS and BELINDA ROSWELL | Index No. 535/14 |
| Plaintiffs, | Motion Date June 9, 2017 |
| - against- | |
| QUEENS WEST DEVELOPMENT CORPORATION, a/k/a QWDC, ROCKROSE DEVELOPMENT CORP., ROCKROSE GENERAL EQUITIES, LLC, 47-05 center LLC, 47-05 CENTER SPE LLC, SIMPLY FOOD LIC, LLC d/b/a FOODCELLAR & CO., and NYC TREES, | Motion Cal. No. 71 |
| | Motion Seq. No. 4 |
| Defendants. | |

The following papers numbered 1 to 30 read on this motion by defendant NYC Trees (NYC Trees) for summary judgment under CPLR 3212 dismissing the second amended complaint of plaintiffs David Nyskohus (Nyskohus) and Belinda Roswell, and all cross-claims against it; a cross motion by defendants Queens West Development Corporation (QWDC) and Rockrose Development Corp. (Rockrose) (collectively, the QWDC Defendants) for summary judgment dismissing plaintiffs' complaint and on their cross-claims for indemnification against co-defendant Simply Food LIC, LLC d/b/a Foodcellar & Co. (Foodcellar); and a cross motion by Foodcellar for summary judgment dismissing plaintiffs' complaint and the QWDC's cross-claims.

| | Papers Numbered |
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| Notice of Motion - Affidavits - Exhibits..... | 1-4 |
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| Answering Affidavits - Exhibits..... | 12-22 |
| Reply Affidavits..... | 23-30 |

Upon the foregoing papers it is ordered that this motion and these cross motions are determined as follows:

Plaintiffs commenced this action to recover for personal injuries allegedly sustained on November 20, 2013 when plaintiff, Nyskohus tripped on a piece of blue string, twine, or rope located on the public sidewalk in front of the premises located at 4-85 47th Road in Long Island City, New York. In the complaint, plaintiff asserts causes of action under common-law negligence and the Sidewalk Law (Administrative Code of City of NY §§ 7-210, 19-152). Co-plaintiff, Roswell asserts ancillary claims for loss of services and consortium. QWDC owned the building where Foodcellar was a tenant pursuant to a triple net lease (the Lease), and Rockrose was the managing agent for the premises. On the date of the accident, Harold DeLucia (DeLucia), individually, and d/b/a NYC Trees, was selling trees outside the supermarket, by agreement with Foodcellar, as he does once a year to earn extra income outside his job as a public school teacher.

On the date of the accident, NYC Trees had set up the tree display on both sides of the sidewalk on 47th Road, in front of Foodcellar, between the entrance door to the supermarket and westbound toward Center Boulevard. While plaintiff described the walkway between the trees as narrow enough that pedestrians had to give way to people walking in the opposite direction on the sidewalk, DeLucia testified that Foodcellar had instructed NYC Trees to allow for two strollers to be able to proceed down the sidewalk side by side. DeLucia performed general oversight of the business and was not present at the time of the subject accident. Rather, he employed two workers, Jacob Kipling and Tom Barlow (Barlow), to operate the Christmas tree display and operations, and Barlow was present at the time of the subject accident. DeLucia testified that the Christmas trees were not individually tied with rope or twine; rather, they were packaged by the tree nursery in netting, in which trees were kept while on display until sold. He stated that the only "rope" ever used by NYC Trees was "thick rope" measuring three to four inches thick, which was to tie all of the trees to a single display stand, and that no rope or twine was used for any other purpose. He stated that no one other than NYC Trees was using or had control over the ropes used to tie the trees to the stands.

Approximately one hour before the accident, plaintiff was walking from his apartment, approximately two blocks away, to the subject supermarket, where he regularly shops, in order to purchase groceries. The accident occurred as plaintiff was exiting the supermarket to return home. He spent approximately ten minutes shopping inside Foodcellar, then exited, made a right turn, and proceeded down the same sidewalk which he traveled along to enter the supermarket. As he was walking on the sidewalk after leaving the supermarket, but before falling, he evidently noticed that the twine used to wrap the trees lining both sides of the sidewalk was the same kind in which he subsequently tripped.

Approximately 50 feet from the exit, plaintiff tripped on something on the sidewalk

which he identified during his deposition as a piece of "blue colored twine" a few millimeters in width, which he first noticed during the act of tripping. He did not recall whether the twine was attached to anything nor how long it was (only that it was long enough to stretched the width of the walkway), but it was stretched taut on the sidewalk. He stated that did not see the twine while walking past the sidewalk before entering Foodcellar, but noted that his general impression of the Christmas tree display was that it was messy, with debris covering the sidewalk. After his fall, he also observed a NYC Trees employee "tidying up or kicking away some of the twine . . . because I had said I tripped on this stuff that was lying around." Plaintiff went to the emergency room and sustained multiple fractures of the right humorous in his arm.

"Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2009]; *Noia v Maselli*, 45 AD3d 746 [2007]). In a premises liability case, a defendant who moves for summary judgment has the burden of making a prima facie showing that it neither created the alleged hazardous or defective condition nor had actual or constructive notice of its existence (*see Minor v 1265 Morrison, LLC*, 96 AD3d 1024, 1024-1025 [2012]; *Zambri v Madison Square Garden, L.P.*, 73 AD3d 1035, 1035 [2010]; *Goldenfeld v Euro Comfort Furniture, Inc.*, 48 AD3d 515, 515-516 [2008]). To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Spindell v Town of Hempstead*, 92 AD3d 669, 670-671 [2012]). While a defendant must maintain the property in a reasonably safe condition, "there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (*see Capasso v Village of Goshen*, 84 AD3d 998 [2011]; *Errett v Great Neck Park Dist.*, 40 AD3d 1029 [2007]).

Moreover, the owner or lessee of land abutting a public sidewalk generally owes no duty to keep the sidewalk in safe condition (*see Berkowitz v Spring Creek, Inc.*, 56 AD3d 594, 595 [2008]), unless the landowner or lessee created the defect, caused it to occur by special use, or violated a specific ordinance or statute which obligates the owner or lessee to maintain the sidewalk and imposes liability for the failure to do so (*see Crawford v City of New York*, 98 AD3d 935, 936 [2012]; *Berkowitz*, 56 AD3d at 595-596). Section 7–210 of the Administrative Code of the City of NY (the Sidewalk Law) shifts liability from the municipality to a property owner for personal injuries proximately caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition, including the negligent failure to hazardous material from the sidewalk.

In moving for summary judgment, NYC Trees cites plaintiff's testimony that, prior to the accident, he had never before complained about the alleged hazardous condition, and NYC Trees had never received any complaints regarding the cleanliness of the sidewalk in or around the Christmas tree display, or regarding ropes or twine strewn on the sidewalk. Moreover, he testified during his deposition that NYC Trees did not use any "blue twine" in their sale or packaging of the Christmas trees. NYC Trees further asserts that it did not have constructive notice of the alleged hazardous condition because the short ten-minute period between the time when plaintiff entered the supermarket, when he testified that he did not see the blue twine on the sidewalk, and when plaintiff first saw the subject twine as he was falling, after exiting the supermarket, was an insufficient period for defendants to remedy the alleged hazardous condition.

First, plaintiffs' cause of action under the Sidewalk Law is dismissed insofar as NYC Trees was not a landlord or tenant under the statute, which is therefore inapplicable, and plaintiff does not oppose the branch of NYC Trees' motion seeking dismissal on this ground.

It is undisputed that defendant does not have actual notice of the alleged hazardous condition, as established by plaintiff's deposition testimony that he had never complained about the alleged hazardous condition prior to the accident, and DeLucia's testimony that NYC Trees had never received any complaints regarding the cleanliness of the sidewalk in or around the Christmas tree display, or regarding ropes or twine strewn on the sidewalk. However, given the conflicting testimony about whether NYC Trees used string, twine, or rope of the same type as the blue twine on which plaintiff allegedly tripped, triable issues of fact remain as to whether NYC Trees ultimately created the alleged hazardous condition (*see Monaco v Hodosky*, 127 AD3d 705 [2015]; *Carlucci v Village of Scarsdale*, 104 AD3d 797 [2013]). Moreover, defendant's reliance on the deposition testimony by Burak Can, on behalf of Foodcellar, stating that he, his business partner, and Foodcellar's employees and floor managers constantly maintained, swept, and cleaned the subject sidewalk throughout the day during NYC Tree's operation of the Christmas tree stand, is unavailing. Although Vladimir Ivash (Ivash), the building manager for Rockrose, testified on behalf of Rockrose/QWDC that his porters under his supervision regularly swept the subject sidewalk on a daily basis, including immediately before the shift ending at 3:00 p.m., and just after a new shift began at 3:00 p.m., such evidence pertains only to general cleaning practices followed by his crew, which is insufficient to meet the initial burden on the issue of constructive notice (*see Ansari v MB Hamptons, LLC*, 137 AD3d 1174 [2016]; *cf. Armijos v Vrettos Realty Corp.*, 106 AD3d 847 [2013]). As NYC Trees fails to make a prima facie showing of entitlement to judgment as a matter of law on the common-law negligence cause of action, the court need not consider the sufficiency of plaintiff's papers in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Next, in cross-moving for summary judgment, the QWDC defendants adopt the arguments in the underlying summary judgment motion by co-defendant NYC Trees, and argue that they did not create or have actual or constructive notice of the or the alleged hazardous condition. They further contend that, should the court not grant summary judgment to NYC Trees on the underlying motion, summary judgment is warranted on the cross-claims for indemnification against Foodcellar pursuant to the Lease between the parties. QWDC avers that it is an out of possession landlord without any duty to perform repairs on or maintain the subject sidewalk, and that such responsibility had been delegated solely to its tenant, Foodcellar.

Contrary to their assertions, the QWDC defendants fail to meet their prima facie burden on summary judgment based on the numerous outstanding triable issues of fact to be resolved by a jury (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Given QWDC's reservation of the right to enter the premises at any time (Paragraph 13 of Foodcellar's Lease) and the employment of superintendent, Ivash to oversee the premises on a daily basis, it cannot be said that it was an out of possession landlord that had relinquished control of the subject premises or that had been relieved of the duty to keep the subject sidewalk in a reasonably safe condition, as it was statutorily obligated to do under the Sidewalk Law (*see Yehia v Marphil Realty Corp.*, 130 AD3d 615 [2015]; *Denermark v 2857 W. 8th St. Assoc.*, 111 AD3d 660, 661 [2013]).

The QWDC defendants also do not meet their *prima facie* burden of establishing that Foodcellar is obligated to indemnify them under the terms of the Lease through any specific provision. Referencing the Article 8 of the Rider which requires the tenant, Foodcellar, to obtain a comprehensive general liability insurance policy naming both itself and the landlord as insured, is insufficient in this regard, and also does not establish that Foodcellar breached any obligation to procure insurance in the landlord's favor in any event. Additionally, the QWDC defendants fail to demonstrate that either QWDC or Rockrose lacked constructive notice of the alleged hazardous condition, as questions remain regarding whether defendants should have known about the alleged hazardous condition, given Ivash's testimony that Rockrose's porters generally cleaned the subject sidewalk around the time of plaintiff's accident, but no evidence exists as to the state of said sidewalk within a reasonable time prior to the accident (*see Ansari*, 137 AD3d 117; *Moreno v County of Nassau*, 127 AD3d 707 [2015]).

Turning to Foodcellar's cross motion for summary judgment, it does not deny that it had a duty to maintain the subject sidewalk in safe condition. The court finds that triable issues of fact remain with regard to whether Foodcellar exercised supervisory control over NYC Trees. Specifically, the evidence raises triable issues with respect to whether Foodcellar directed how the business was operated (e.g., delivery of the trees, as well as the

manner in which the display was set up) and further provided operational support for the business, such as electricity, bathroom facilities, and food. Moreover, triable issues exist regarding whether Foodcellar should have known about the alleged hazardous condition, given that its employees were constantly monitoring and cleaning the subject sidewalk, but no evidence exists as to any specific inspection or cleaning which reflects the condition of said sidewalk within a reasonable time prior to the accident (*see Ansari*, 137 AD3d 117; *Moreno*, 127 AD3d 707).

Among other reasons, as none of the moving defendants can conclusively establish, as a matter of law, that either had insufficient time to remedy the alleged hazardous condition, and therefore lacked constructive notice, summary judgment dismissing plaintiffs' complaint is not appropriate (*see Hickson v Walgreen Co.*, 150 AD3d 1087 [2017]). Summary judgment on the QWDC defendants' third-party indemnification claims against Foodcellar under both common-law and the Lease to Foodcellar is similarly unwarranted, as they failed to demonstrate that they did not have a duty to maintain the subject sidewalk in a safe condition, that they fulfilled such nondelegable duty, and that Foodcellar's negligence contributed to the happening of the accident (*see Morris v Home Depot USA*, 152 AD3d 669, 672-673 [2017]), or identify the contractual basis on which they allege Foodceller is obligated to indemnify them.

The court has considered the parties' remaining contentions and determined them to be unavailing.

Accordingly, NYC Trees' motion for summary judgment is granted only with respect to dismissing the cause of action under the Sidewalk Law. The respective cross motions of the QWDC defendants and Foodcellar are denied.

Dated: December 4, 2017

DARRELL L. GAVRIN, J.S.C.